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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1979

No. 79-1588

FEDERATION FOR AMERICAN IMMIGRATION REFORM, ET Al., - Appellants,

versus

PHILIP M. KLUTZNICK, Et Al., - - Appellees.

On Appeal From The United States District Court For The District Of Columbia

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Brief of the Commonwealth of Kentucky on Relation of Steven L. Beshear, Its Attorney General, Joined by the State of West Virginia on Relation of Chauncey H. Browning, Its Attorney General, as Amicus Curiae in Support of Appellants' Jurisdictional Statement

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INTRODUCTION — INTEREST OF AMICUS CURIAE

The Commonwealth of Kentucky on relation of its Attorney General, submits this brief in support of appellants' jurisdictional statement pursuant to Supreme Court Rule 42(1)(4) which permits the filing of such a brief by a state Attorney General without the consent of the parties. Amicus curiae Common-

wealth of Kentucky believes the issues presented by appellant in its jurisdictional statement are of such a magnitude that a definitive statement by the court is needed to protect the substantial interests of the citizens of the Commonwealth and the United States. The State of West Virginia on relation of its Attorney General joins the Commonwealth of Kentucky in submitting this brief.

STATEMENT OF THE CASE

The plaintiffs, Federation for American Immigration Reform, The Honorable Walter D. Huddleston, member of the United States Senate representing Kentucky and others, filed their complaint in the United States District Court for the District of Columbia alleging that their constitutional rights were being abridged by the method and manner by which the Decennial Census for 1980 (hereinafter Census) was to be conducted. They noted that the apportionment of representatives to the United States House of Representatives and the distribution of federal funds would flow from the tabulations of the Census Bureau. More specifically, plaintiffs alleged that through a concerted effort on its part the Census Bureau intended to include in the Census a large concentration of individuals who had entered or remained in this country unlawfully and who will be referred to in this Brief as "illegal aliens."

Flowing from the report of the Census to the President is the apportionment of representatives to

the United States House of Representatives, the number of Presidential Electors each state is entitled to appoint, as well as federal funds that are distributed from more than 100 Federal assistance programs. Intrastate reapportionment also flows from the Census in many states.

Illegal aliens are primarily congregated in the major areas of our ten most populous states — California, New York, Texas, Pennsylvania, Illinois, Ohio, Michigan, New Jersey, Florida and Massachusetts. (Affidavit of Lance Tarrance submitted to the District Court). The Census Bureau has made a "major effort" to include "illegal aliens" in the 1980 Census Bureau report. The Census Bureau will include these illegal aliens in its report without any differentiation between them and citizens and lawful aliens in this country. Since there are between three and eight million illegal aliens in the United States, including these illegal aliens in the Census tabulation will have a "significant" impact on legislative and fiscal apportionments flowing from the 1980 census. (Tarrance affidavit, *id.*) Inclusion of such illegal aliens in the Census report will therefore have an adverse effect on the citizens of the various states, including Kentucky, with a small illegal alien population.

Appellants therefore asked the District Court for relief by enjoining the taking of the Census and/or the promulgation or use of the tabulations and other data derived therefrom in a manner repugnant to and violative of the Constitution and laws of the United States. Plaintiffs also asked for a Declaratory Judgment, de-

claring that the method employed in the taking of the Census and/or the use of the tabulations and other data derived therefrom is repugnant to and violative of the Constitution and laws of the United States and is arbitrary, capricious and abusive of the discretion conferred upon the Director of the Census and other defendants. The District Court declined to grant appellants the relief to which they were entitled and this appeal followed. It is the position of Amicus Curiae that relief should be granted from the effect of this improper manner of Census taking.

ARGUMENT

THE QUESTIONS INVOLVED IN THIS APPEAL ARE SUBSTANTIAL.

The most apparent inequities flowing from this improper method of taking the Census will be the following:

1. Representatives to the United States House of Representatives will be apportioned on the basis of incorrect census data. Thus individuals in states and areas with a large distribution of illegal aliens will receive disproportionate representation before the Congress of the United States.

2. The apportionment of Presidential Electors will give states with a large distribution of illegal aliens an unconstitutional advantage over areas with little or no illegal alien population.

3. Reapportionment of state legislatures in states with a large population of illegal aliens will be disproportionate.

4. Funds flowing from Federal programs will be unequally distributed.

A. Apportionment of Representatives to Congress

The Fourteenth Amendment to the U. S. Constitution states in part:

> Section 2: "Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of *persons* in each State, excluding Indians not taxed. . ." (Emphasis added.)

Under no stretch of the imagination could the framers of the constitution or the ratifiers of the Fourteenth Amendment have meant to include fugitives from justice who have entered this country illegally in the term "persons."

If a state law which counts votes of citizens in one part of the state disproportionately to citizens in another part of the state is unconstitutional, it is obvious that a census which causes disproportionate representation in the United States Congress is unconstitutional. *Reynolds* v. *Sims,* 377 U. S. 533, 12 L. Ed. 506, 84 S. Ct., 1362 (1964). The obvious inequities of the effects of including illegal aliens in the Census demands review by this court.

B. Disproportionate Presidential Elections

The arguments evidencing the need for review by this Court to avoid disproportionate representation in the United States Congress apply equally well in

arguing that the inequities in selecting a President, flowing from the taking of the Census, require review. In both examples the principals are the same. A person should not have his representation or vote diminished because of the encroachment of illegal aliens.

C. Reapportionment of State Legislatures

Since Kentucky has very few, if any, illegal aliens within its borders, this issue will not directly affect Amicus Curiae. The arguments concerning "one man, one vote" and the apportionment of the United States Congress again point to this obvious inequity.

D. Unequal Distribution of Federal Funds

Citizens of Kentucky pay into the United States Treasury a portion of their income and other taxes. In return, they are entitled pursuant to certain federal statutes to the return of some tax dollars under the more than 100 federal programs. To allow a disproportionate advantage to states and the citizens thereof with large illegal alien populations creates the unconstitutional taking of property without due process of law. (Sec. 1 of the Fourteenth Amendment of the United States Constitution).

IMPORTANCE OF THE QUESTIONS INVOLVED.

The taking of the Census affects each and every citizen of the United States. It is imperative that the Census tabulations follow constitutional guidelines.

There is, however, a paucity of cases setting forth the constitutional standards. A mistake in the method of census enumeration can adversely or disproportionately affect the quality of lives of the "persons" of the United States. Accepting jurisdiction in this case is therefore of vital concern to all citizens of the United States.

CONCLUSION

It is constitutionally unlawful as well as obviously inequitable for the Census Bureau to cause the harmful effects enumerated in this brief as a result of including illegal aliens in the 1980 Census count. Because of the uniqueness of the questions presented and the sweeping effect of a decision in this case, the Court should note probable jurisdiction.

Respectfully submitted,

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PROOF OF SERVICE

I, Robert V. Bullock, a member of the bar of the Supreme Court, do hereby certify that, pursuant to Rules 33(1) and (2) (a) of the Rules of the Supreme Court, three copies of Brief of Amicus Curiae in support of appellants' Jurisdictional Statement were served this 29th day of May, 1980, by mail, upon counsel of record for all parties in this proceeding, as follows:

1. Upon George J. Weiner, Schmeltzer, Aptaker & Sheppard, P.C., Suite 500, 1900 Massachusetts Avenue, N.W., Washington, D.C. 20036, Counsel for Appellants;

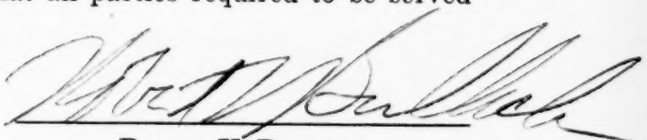
2. Upon Wade H. McCree, Solicitor General of the United States and counsel of record for Appellees Klutznick, et al., by mailing copies addressed to him at the Office of the Solicitor General of the United States, U. S. Department of Justice, Room 5143, 10th & Constitution Avenue, N.W., Washington, D.C. 20530;

3. Upon Daniel K. Mayers and John Payton, counsel of record for Intervenor-Appellees the State of New York, et al., by copies addressed to them at the offices of Wilmer & Pickering, 1666 K Street, N.W., Washington, D.C. 20006;

4. Upon Paul S. Ryerson and Mark L. Perlis, counsel of record for Amicus Curiae, the Mexican-American Legal Defense and Educational Fund, in the proceeding below, by copies addressed to them at the offices of Arnold & Porter, 1229 - 19th Street, N.W., Washington, D.C. 20036; and

5. Upon Benson Scotch, Assistant Attorney General, State of Vermont, counsel of record for applicant Amicus Curiae, the State of Vermont, in the proceeding below, by mailing said copies, postage prepaid, to him at the Office of the Attorney General, State of Vermont, Pavilion Building, Second Floor, Montpelier, Vermont 05602.

I further certify that all parties required to be served have been served.



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